

**COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

<b>Investigation by the Department of Telecommunications and Energy ) on its own Motion into the Appropriate Regulatory Plan to succeed ) Price Cap Regulation for Verizon New England, Inc. d/b/a Verizon ) Massachusetts' intrastate retail telecommunications services in the ) Commonwealth of Massachusetts )</b>	<b>D.T.E. 01-31 Phase II Track A</b>
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**COMMENTS OF THE ATTORNEY GENERAL ON  
AT&T COMMUNICATIONS OF NEW ENGLAND, INC.'S  
MOTION FOR SUMMARY JUDGMENT**

**I. INTRODUCTION**

These comments respond to the AT&T Communications of New England ("AT&T") Track A Motion for Summary Judgment filed on December 13, 2002 ("Motion").<sup>1</sup> AT&T asserts in its Motion that Verizon New England, Inc. d/b/a Verizon Massachusetts ("Verizon" or "the Company") failed to prove that the Company's June 5, 2002 Compliance Filing ("Compliance Filing") satisfied the Department's directives in the Phase I Order pertaining to Verizon's unbundled network element ("UNE") use and commingling policies. Motion, p. 1; *Verizon*, D.T.E. 01-31 Phase I Order, May 8, 2002 ("Phase I Order"), p. 88, *citing* Exh. DTE-ATT 2-5, n.2

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<sup>1</sup> Under 220 CMR §1.06 (6)(e):

A party may move at any time after the submission of an initial filing for dismissal or summary judgment as to all issues or any issue in the case. The motion shall be filed in writing and served on all parties. A motion for summary judgment shall set forth in detail such supporting facts as would be admissible in evidence. The presiding officer shall afford other parties a reasonable time to respond in writing, and may, in his or her discretion, permit oral argument on the motion.

(D.T.E. 01-31, Phase I). AT&T asks the Department not to approve the Compliance Filing because, according to AT&T, there is no genuine issue of material fact as to whether Verizon satisfied the Department's Phase I Order directives. The record is simply not sufficient for the Department to make that finding. Instead, the Department should order additional investigation of Verizon's compliance.

## **II. THE CONTESTABILITY REQUIREMENT AND AT&T'S MOTION**

In its Phase I Order, the Department granted Verizon pricing flexibility over its retail business services that are contestable on a UNE basis.<sup>2</sup> Phase I Order, pp. 88-89. Contestability is important because it affects the extent to which Verizon's competitors can enter the market, whether potential entrants exert competitive pressure on the incumbent Verizon, and whether a price squeeze exists between retail prices and wholesale prices. On June 5, 2002, Verizon filed its Compliance Filing in which it purports to show that its retail business services are contestable. Exh. VZ-1. The Department noted in its August 5, 2002 Phase I-A order that it had not issued specific findings on the Company's UNE use and commingling evidence. Phase I-A Order, p. 15.

On August 22, 2002, the Department split the investigation into two Tracks and held that Track A would consist of two rounds of comments and limited pre-filed testimony on whether Verizon's Compliance Filing satisfied the Department's contestability requirement and other directives. Tr. 1, pp. 4-5 (August 22, 2002 procedural conference). The Department specifically

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<sup>2</sup> The contestability issue is whether the Company's retail business services and private line services were contestable on a UNE basis (*i.e.*, whether Verizon's retail business prices are based on a price floor which reflected the wholesale UNE prices that Verizon charges its competitors). These comments supplement, but do not replace, the Attorney General's arguments presented in his initial and reply briefs filed in Phase II.

overruled the Attorney General's and AT&T's repeated requests for further proceedings on Track A issues. Attorney General's August 15, 2002 Comments on the Proposed Procedural Schedule, p. 7; AT&T's June 25, 2002, Comments; Tr. 1, pp. 21-23 (August 22, 2002 procedural conference).

Subsequently, Verizon asserted that "the Department has already ruled that AT&T's arguments concerning UNE use restrictions and commingling have already been decided" in the Department's Phase I-A Order (August 5, 2002). Verizon's Supplemental Response To The Department's Supplemental Information Request, Track A (October 15, 2002), p. 1 ("Supplemental Response"). A careful reading of the Phase I-A Order, however, shows that the Department said that it "did not make specific findings on AT&T's UNE use restrictions and commingling arguments in the Phase I Order." Phase I-A Order, p. 15.

In its Motion, AT&T challenges Verizon's assertion that the Company complied with the Department's Phase I Order to show which retail business services and private line services are contestable on a UNE basis. Motion, p. 1. AT&T contends that the Department should not approve the Compliance Filing (Exh. VZ-1) because there is no dispute that: (1) competitive local exchange carriers ("CLECs") are unable to use UNEs in a commercially feasible way to provide competitive local business service; and (2) Verizon failed to demonstrate that its use and commingling restrictions and policies do not preclude the use of UNEs to provide local business services. *Id.* In the alternative, AT&T urges the Department to conduct hearings and allow briefing to resolve these disputed issues of fact. *Id.*<sup>3</sup>

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<sup>3</sup> AT&T also asks the Department to dismiss the Compliance Filing because Verizon did not reduce special access charges to total element long-run incremental costs ("TELRIC") levels, and to  
(continued...)

### III. STANDARD OF REVIEW FOR SUMMARY JUDGMENT

The Department's procedural rules recognize the use of a summary judgment procedure in Department decisions. 220 C.M.R. §1.06(e). The Department and reviewing courts have found that an administrative agency can properly apply summary judgment procedures where the pleadings and filings conclusively show that the absence of a hearing could not affect the decision. *Re Stow Municipal Electric Department*, D.T.E. 94-176-C, p. 22, n.3 (2001); *Re Plymouth Rock Energy Associates, L.P.*, D.P.U. 92-122, p. 2 (1999); *Gaslantic Corp. v. Fall River Gas Co.*, D.P.U./D.T.E. 96-101, p. 11 (1999); *Massachusetts Outdoor Advertising Council v. Outdoor Advertising Board*, 9 Mass.App. 775, 785-786, 405 N.E.2d 151, 156-157 (1980); *Hess and Clark, Division of Rhodia, Inc. v. Food and Drug Administration*, 495 F.2d 975, 985 (D.C. Cir. 1974).

The Department will grant summary judgment if its review of the prefiled testimony, the material obtained from discovery, and the memoranda of the parties, shows that there is no genuine issue as to any material fact, and that a party is entitled to judgment as a matter of law. *In Re IMR Telecom*, D.P.U. 89-212, 113 PUR 4<sup>th</sup> 452, p. 6 (1990). Mass. R. Civ. P. Rule 56; *Cambridge Electric Light Company/ MIT*, D.P.U. 94-101/95-36 (1995). The Department will deny summary judgment if the prefiled testimony is not clear on the disputed facts and if subsequent hearings could prove or disprove the disputed facts. *Re Berkshire Gas Company*, D.P.U. 89-112, 105 PUR 4<sup>th</sup> 541, p. 8 (1989).

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<sup>3</sup>(...continued)  
examine the degree to which certain Verizon policies are restricting competition. Motion, pp. 1-3. The Attorney General's comments do not address these requests separately because the Department could resolve them through further hearings, as discussed below.

#### IV. ARGUMENT

##### A. There Is A Dispute Of Material Fact Regarding Contestability

AT&T's Motion asks the Department to find that there is no genuine issue of material fact regarding Verizon's compliance with the Department's contestability requirement and that AT&T is entitled to judgment on that issue as a matter of law. Motion, p. 1. Whether Verizon's retail business services are contestable, *i.e.*, whether the Company's retail business prices reflect a UNE-based price floor, is an issue of material fact in the case, according to the Department:

Moreover, it is possible that duplicate ubiquitous networks may never be developed by multiple LECs; therefore, *the ability to use UNEs as a profitable method of entry and expansion in Massachusetts is important to the development of competition. Consequently, the Department will require a UNE-based price floor for Verizon's business services that are contestable on a UNE basis (see Exh. DTE-ATT-2-5, at n.2).* The price floor should be equal to the UNE rates for the elements that make up the retail service, plus a mark-up for Verizon's retailing costs as reflected in the wholesale discount. The price floors will be density-zone-specific.

Phase I Order, pp. 88-89 (emphasis added, footnote omitted). Verizon responded in its June 5, 2002 Compliance Filing that "pricing for these services will be at the discretion of the Company, subject to any price floor requirement set by the Department." Exh. VZ-1, Tab A, p. 2. Verizon did not offer any supporting testimony on contestability aside from its October 15, 2002 Supplemental Response. Verizon acknowledged during hearings that the Department had not undertaken a price floor analysis during Phase II. Tr. 3, p. 309.

AT&T claims, however, that the retail business services listed in Tab C of the Compliance Filing (*e.g.*, all DS1 and above facilities) are not contestable because Verizon's use and commingling; "no facilities, no build;" and unbundled network element loop ("UNE-L") "hot-cut" process policies prevent AT&T and other competitive local exchange carriers from

using UNEs profitably to provide competing business services. Exh. DTE-ATT 1-1. AT&T contends that Verizon's UNE policies require AT&T to create unnecessary redundant facilities to prevent local and long distance traffic from commingling on the same circuits. *Id.* AT&T asserts that it is forced to purchase the more-expensive special access circuits to provide service instead of using UNE circuits. *Id.* As part of its discovery response, AT&T included Ms. Waldbaum's August 24, 2001 testimony from D.T.E. 01-31 Phase I. The Department did not allow testimony or briefing on AT&T's Track A arguments. Tr. 1, p. 24 (August 22, 2002 procedural conference); Tr. 3, pp. 298-299.

**B. The Record On Contestability Is Incomplete**

The Track A evidentiary record on contestability consists of Exh. DTE-ATT 1-1 and the Company's October 15, 2002 Supplemental Response. Contestability should include a Departmental determination of the effects of the Company's UNE policies, as well as its price floors. Other than in its Supplemental Response, Verizon has produced some but not a complete factual response to AT&T's charges of non-contestability. In its Supplemental Response, Verizon presents many legal arguments but few pieces of factual evidence regarding its compliance with various FCC "safe harbor" rules that affect its use and commingling restrictions, as well as the justifications for its "no facilities, no build" policy and special access service policies. Supplemental Response, pp. 1-22.

The parties did not subject these legal assertions and limited evidence to cross examination or briefing because the Department did not permit them to do so under the Department's August 22, 2002, Track A procedural schedule. The filings on the current record do not "conclusively show that the absence of a hearing could not affect the decision." *Re Stow*

*Municipal Electric Department*, D.T.E. 94-176-C (2001), p. 22, n. 3. Rather, additional hearings could prove or disprove the disputed facts, making summary judgment inappropriate and making further hearings necessary. *Re Berkshire Gas Company*, D.P.U. 89-112, 105 PUR 4<sup>th</sup> 541 (1989), p. 8.

While Verizon's Supplemental Response and Exh. DTE-ATT 1-1 present enough evidence to create a genuine issue of material fact, the record still is insufficient to support an agency decision on whether Verizon has complied with the UNE contestability requirement. Based on the limited record developed in Phase II, there is a factual dispute over an important issue on which the record is only partially developed – whether Verizon's business services are UNE-contestable. Hence, summary judgment is inappropriate.

**C. The Department Should Allow Additional Process To Develop The Record**

AT&T's challenge to Verizon's compliance highlights a deficiency in the record. Rather than grant AT&T summary judgment, however, the Department should order Verizon to present a full factual case regarding contestability and should allow the parties to test and brief the issue before the Department renders its decision. The Department should allow parties to conduct additional discovery, file testimony, cross-examine witnesses, and submit briefs on the contestability of Verizon's Track A business services.

The Department has already determined that Phase III of its investigation will consist of “a further investigation to compare UNE rates to Verizon's residential retail rates. If we conclude that retail rates are below UNE costs, and, thus, impede efficient competition for those services, we will take the appropriate steps to remedy the inefficiency.” Phase I Order, p. 101. The Phase III investigation also will include a review of universal service funding as an option to

remedy inefficiencies in pricing.<sup>4</sup> Phase I-A Order, pp. 15-16. The Department should examine the business contestability issues when the Department examines the residential retail price squeeze and universal service issues in Phase III.<sup>5</sup>

## **V. CONCLUSION**

For these reasons, the Department should deny AT&T's Motion, order Verizon to present a full factual case regarding contestability, and allow the parties to submit additional discovery, file testimony, conduct cross-examination, and submit briefing on Verizon's Track A business contestability issues during Phase III.

Respectfully submitted

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by: 

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<sup>4</sup> "A discussion of universal service funding as a method to remedy inefficiency in the pricing of Verizon's basic residential services more appropriately belongs in that further investigation after new UNE rates have been established in D.T.E. 01-20, and after the comparison between UNE rates and Verizon residential rates has been made ... ." D.T.E. 01-31 Phase I-A Order, pp. 15-16. In that further investigation, the Department should examine why Massachusetts penetration rates dropped to the region's lowest level, while nationwide penetration was rising, after the Department raised rates in 1990-1994.

<sup>5</sup> The commencement date for Phase III is uncertain given that the Department has not established final UNE rates in D.T.E. 01-20. If the Department is inclined to consider establishing a statewide universal service fund, the Department should allow full discovery, testimony, evidentiary hearings and briefing to ensure that all positions on this issue are heard.